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## State Water Resources Control Board

### NOTICE OF PROPOSED EMERGENCY RULEMAKING

#### Amendment and Renewal of Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin (Delta) Watershed

#### Proposed Amendment and Renewal of Sections 876.1, 878.2, and 879, and Proposed Renewal of Sections 877.1, 878, 878.1, 879.1, 879.2, and 879.3 in Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations

July 25, 2022

#### Required Notice of Proposed Emergency Action

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency must provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. This document provides the required notice. After the submission of the proposed emergency regulation to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulation as set forth in Government Code section 11349.6.

#### Proposed Emergency Action

On May 10, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency for 41 counties, including those within the Sacramento-San Joaquin Delta (Delta) watershed ([May 2021 Proclamation](#)), in response to drought conditions. The May 2021 Proclamation directed the State Water Resources Control Board (State Water Board or Board) to consider adopting an emergency regulation to curtail water diversions in the Delta watershed when water is not available at water right holders' or claimants' priority of right or to protect releases of stored water. On March 28, 2022, Governor Newsom signed an [executive order](#) acknowledging the continued drought conditions throughout the State, extending the authorities and directives of the May 2021 Proclamation, and calling for increased conservation efforts. The May 2021 Proclamation suspended environmental review under the California Environmental Quality Act (Public Resources Code, Division 13, commencing with section 21000 and regulations adopted

pursuant to that Division) for certain actions, including the adoption of emergency regulations by the State Water Board pursuant to Water Code section 1058.5.

Water Code section 1058.5 provides the State Water Board the authority to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency in order to prevent the unreasonable use of water, to require curtailment of diversions when water is not available under the diverter's priority of right, or to require monitoring and reporting of diversion or use.

On August 3, 2021, the State Water Board adopted an emergency curtailment and reporting regulation for the Delta watershed. In general, the regulation authorizes the Board to issue curtailment orders in the Delta watershed when water is determined to be unavailable at a diverter's priority of right, and to require reporting related to a diverter's diversion and use of water. The regulation also provides for continued diversions for minimum human health and safety needs and certain non-consumptive uses. The regulation was approved by OAL and went into effect upon filing with the Secretary of State on August 19, 2021. The regulation will expire one year from this date.

On July 20, 2022, the State Water Board adopted a resolution to revise and renew the emergency curtailment and reporting regulation adopted in 2021.

### **Proposed Text of Emergency Regulation**

See the attached revised text of the proposed renewed emergency regulation.

On April 19, 2022, the State Water Board released draft revisions to the text of the proposed renewed emergency curtailment and reporting regulation for the Delta watershed for public review and comment. Board staff made revisions to the text and released for further public input a subsequent draft of the regulation text on June 27, 2022 (with minor corrections provided July 6, 2022). Written comments were due on July 8, 2022. The revised text of the proposed renewed emergency regulation is also available on the [Delta Watershed Drought webpage](#).

### **Finding of Emergency** (Gov. Code, § 11346.1, subd. (b))

The State Water Board finds that an emergency continues to exist due to severe drought conditions in the Delta watershed, as identified in the Governor's May 2021 Proclamation and March 2022 executive order.<sup>1</sup> The continuing drought requires immediate action to renew the State Water Board's authority to effectively protect senior diverters, protect releases of previously stored water, and ensure continued access to water supplies to meet minimum human health and safety needs.

Absent the emergency regulation, the State's authority to curtail diversions and enforce those curtailments will not provide for timely and effective implementation of the State's water rights priority system during the current drought emergency. During this urgent time, thousands of water rights and claims require curtailment and enforcement in a short period of time to avoid possible catastrophic impacts to reservoir storage needed for human

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<sup>1</sup> Pursuant to Water Code section 1058.5, subdivision (b), the State Water Board's finding of emergency made in connection with this proposed renewed emergency regulation is not subject to review by OAL.

health and safety and other purposes, as well as impacts to legal users of water. The emergency regulation would improve the State Water Board's ability to quickly and effectively impose and enforce curtailments to ensure that the State's water rights priority system is effectively implemented during the drought emergency.

In addition, the State Water Board needs an enforceable mechanism to collect enhanced reporting information related to the diversion and use of water in the Delta watershed to inform water demand estimates and the curtailment process. In order to more effectively implement the water rights priority system in the Delta watershed under current drought conditions, the State Water Board needs access to accurate information regarding water rights, water diversion and use, and projected demand, at a timestep that allows the Board to more quickly and effectively determine water unavailability during the drought emergency.

The State Water Board is unable to address the situation through non-emergency regulations because the need for this regulation has arisen due to the current drought emergency and would not be appropriately or timely be addressed by non-emergency regulations.

More information regarding the State Water Board's finding of emergency can be found in the Informative Digest for the proposed renewed regulation, which is incorporated by reference and is available on the [Delta Watershed Drought webpage](#).

**Authority and Reference** (Gov. Code, § 11346.5, subd. (a)(2))

Water Code sections 1058 and 1058.5 provide authority for the emergency regulation. The proposed renewed regulation implements, interprets, or makes specific Article X, section 2 of the California Constitution, and sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 348, 1011, 1011.5, 1051, 1052, 1055, 1058.5, 1253, 1825, 1831, and 1841 of the Water Code. The proposed renewed regulation also interprets and implements the State Water Board's authority to prevent the unreasonable use of water, described in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, and *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937.

Additional detail regarding the authority and references associated with the proposed renewed regulation can be found under each section of the proposed renewed regulation text available on the [Delta Watershed Drought webpage](#).

**Informative Digest** (Gov. Code, § 11346.5, subd. (a)(3))

Immediate action is needed to renew the State Water Board's authority to effectively and efficiently administer and enforce the State's water rights priority system in light of severely limited water availability in the Delta watershed during the current drought emergency. Existing law establishes a water rights priority system that determines the order in which diverters must curtail their diversions when natural and abandoned flows are insufficient to satisfy all the demands on a watercourse. Existing law also allows for a departure from the priority system to the extent necessary to prevent the unreasonable diversion or use of water. (Cal. Const., art. X, § 2; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 965-966.) Existing law does not, however, specify how to calculate when natural and abandoned flows are unavailable for diversion under junior water rights in the Delta watershed, establish whether an exception to strict application of

the water rights priority system is warranted to ensure minimum human health and safety needs continue to be met during the drought emergency, establish procedures for ordering curtailments, or establish monitoring and reporting requirements necessary to effectively and efficiently implement curtailments.

The State Water Board will need to continue to curtail water diversions when natural or abandoned flows in the Delta watershed are unavailable at right holders' or claimants' priorities of right to: (1) protect senior water right holders; (2) prevent the illegal diversion of previously stored water released for downstream use or rediversion, including water released from storage to meet water quality or flow requirements to protect various beneficial uses of water (e.g., drinking water, agriculture, fish and wildlife); and (3) ensure that minimum human health and safety needs are met.

The proposed renewed emergency regulation will provide more clarity to the public and water right holders and claimants regarding the information and methodology the State Water Board's Division of Water Rights will use for determining the extent to which water is unavailable for diversion at water users' different priorities of right. It also will authorize the Deputy Director for the Division of Water Rights (Deputy Director) to issue curtailment orders requiring recipients to cease diversions unless and until (1) they have authorization to continue diverting pursuant to one of the exceptions enumerated in the regulation, or (2) they receive notice that the curtailment order has been suspended. The emergency regulation will allow for more effective and enforceable curtailments during the drought emergency through curtailment orders that are based on a specified methodology or comparable tool for determining when water is unavailable under water right priorities—an issue of fact frequently contested in traditional enforcement proceedings to prevent unauthorized diversions—and by making the requirement to cease diversions in response to a curtailment order a regulatory requirement regardless of the curtailed user's basis of right. The proposed renewed regulation also will promote the human right to water codified in Water Code section 106.3 by establishing procedures for important exceptions to curtailments based on minimum human health and safety needs. In addition, the proposed renewed emergency regulation will authorize the Deputy Director to issue orders requiring recipients to provide the State Water Board with information related to current and projected diversion and use of water in the Delta watershed. The emergency regulation will thus provide the State Water Board with an enforceable mechanism to obtain current year demand data to inform its water unavailability determinations.

There is no comparable federal statute or regulation. The proposed renewed regulation is not inconsistent or incompatible with existing state regulations.

More information regarding existing laws, the need for the proposed renewed regulation, and the anticipated effect of the proposed renewed regulation can be found in the Informative Digest for the proposed renewed regulation, which is incorporated by reference and is available on the [Delta Watershed Drought webpage](#).

**Other Matters Prescribed by Statute** (Gov. Code, § 11346.5, subd. (a)(4))

The proposed renewed emergency regulation would require curtailment of diversion when water is not available under diverters' priority of right and require reporting of diversion or use or the reporting of other information needed to implement and enforce curtailments. The proposed emergency regulation was adopted during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency

Services Act (Chapter 7 (commencing with section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions.

**Local Mandate** (Gov. Code, § 11346.5, subd. (a)(5))

The proposed renewed emergency regulation does not impose a mandate on local agencies or school districts because it does not mandate a new program or a higher level of service of an existing program. The regulation is generally applicable to public and private entities, and is not unique to local government. No state reimbursement is required by part 7 (commencing with section 17500) of Division 4 of the Government Code.

**Estimate of Cost or Savings** (Gov. Code, § 11346.5, subd. (a)(6))

The fiscal effects resulting from the proposed renewed emergency regulation are the costs that would be incurred by state and local government agencies to respond to any requirements therein, pursuant to Government Code section 11346 et seq. The Fiscal Impact Statement for the proposed emergency regulation has been prepared in accordance with State Administrative Manual sections 6600-6616.

The fiscal effect on local and state government agencies as a result of the proposed renewed emergency regulation includes the costs: (1) to complete and submit certification forms that have not yet been submitted; (2) to prepare ongoing diversion and projected demand reporting on a monthly basis; (3) resulting from curtailments due to exceptions to priority-based curtailments for minimum human health and safety needs; and (4) resulting from curtailments due to the protection of foregone diversions by the Sacramento River Settlement Contractors or Feather River Contractors in accordance with an operations plan that meets specified criteria.

The State Water Board conservatively estimates the total cost to all state and local governmental agencies due to the proposed renewed emergency regulation to be \$28.4 million. This is comprised of a net fiscal cost of \$69.9 million to state government and a net fiscal cost savings of \$41.5 million to local governments.

More detailed information regarding the cost or savings of the proposed emergency regulation can be found in the Fiscal Impact Statement, Appendix 1 of the Informative Digest for the proposed renewed emergency regulation, which is available on the [Delta Watershed Drought webpage](#).

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Date                      July 25, 2022

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*Jeanine Townsend*  
Jeanine Townsend  
Clerk to the Board

**Emergency Curtailment Regulation to Protect Water Supplies in the Sacramento-San Joaquin Delta Watershed**

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Readopt California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, Sections 877.1, 878, 878.1, 879.1, 879.2, and 879.3 and revise Sections 876.1, 878.2, and 879 to read:

**Article 24 Curtailment of Diversions Due to Drought Emergency**

**876.1 Emergency Curtailments Due to Lack of Water Availability in the Sacramento-San Joaquin Delta Watershed**

(a) This section applies to direct diversions and diversions to storage, of natural and abandoned flows, in the Delta Watershed as defined in section 877.1. This section also applies to the rediversion of water released from storage in the Delta Watershed, except to the extent authorized by a water right or contract.

(b) After the effective date of this regulation, when flows are determined to be insufficient to support all diversions, the Deputy Director as defined in section 877.1 may issue curtailment orders as defined in section 877.1 to water right holders and claimants in the Delta Watershed in order of water right priority, requiring the curtailment of water diversion under designated water rights and claims, except as provided in sections 878, 878.1, 878.2, and 879.1 subdivision (b). Before issuing curtailment orders to water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.

(c) Initial orders requiring curtailment or reporting will be mailed to each water right holder, claimant, or the agent of record on file with the State Water Board, Division of Water Rights within the Delta Watershed. The initial orders will require reporting in accordance with section 879, subdivision (c)(1) and will either require curtailment or will instruct the water right holder, claimant, or agent of record regarding procedures for potential future curtailments. The water right holder, claimant, or agent of record is responsible for immediately providing notice of the orders to all diverters exercising the water right or claim covered by the orders. Communications regarding changes in water availability, including notification of when curtailments of water diversions are required and when curtailments are temporarily suspended or reimposed, will be provided by email to the State Water Board's Delta Drought email distribution list and by posting on the State Water Board's drought webpage. Notice provided by email and by posting on the State Water Board's drought webpage shall be sufficient for all purposes related to required curtailments and reporting pursuant to this section and section 879.

(d) In determining whether water is unavailable under a water right holder or claimant's priority of right and whether to order curtailment of water diversions under specific water rights, the Deputy Director will consider:

(1) Relevant available information regarding date of priority, including but not limited to claims of first use in statements of water diversion and use, judicial and State Water Board decisions and orders, and other information contained in the Division of Water Rights' files. Absent evidence to the contrary, riparian water rights are presumed senior to appropriative water rights for the purposes of curtailments pursuant to this section.

(2) Monthly water right demand projections based on reports of water use for permits and licenses, or statements of water diversion and use, from calendar years 2018, 2019, 2020, or 2021, and water right demand projections based on annual watermaster reports.

(3) Monthly water right demand projections based on information submitted in response to an informational order issued under section 879, subdivision (c).

(4) Water supply projections based on the following sources of forecasted supply data:

(A) Monthly full natural flow forecasts contained in the Department of Water Resources' California Cooperative Snow Surveys Bulletin 120 Water Supply Forecast, where available;

(B) Daily full natural flow forecasts from the California Nevada River Forecast Center; and

(C) Other available and reliable data on projected or actual precipitation and runoff events that may inform water availability at a monthly or sub-monthly scale.

(5) Relevant available information regarding stream system disconnection where curtailing diversions would not make water available to serve senior downstream water rights or claims, including seasonal or temporary disconnections.

(6) The Deputy Director may also consider any other pertinent, reliable, and publicly available information when determining water right priorities, water availability, water supply projections, and demand projections.

(7) Evaluation of available water supplies against demands may be performed using the Water Unavailability Methodology for the Delta Watershed, or comparable tools. The Water Unavailability Methodology for the Delta Watershed is described in the Water Unavailability

Methodology for the Delta Watershed report dated June 27, 2022, which is hereby incorporated by reference. Evaluation of available supplies against demands may be performed at the Hydrologic Unit Code level 4 Sacramento and Hydrologic Unit Code level 4 San Joaquin River watershed scale, or at the subwatershed scale. Subwatersheds within the Delta Watershed are defined in the Water Unavailability Methodology for the Delta Watershed report dated June 27, 2022, and were established based on Hydrologic Unit Code level 8 watersheds.

(8) Monthly demand projections for water rights or claims held by the Sacramento River Settlement Contractors (SRSC) or the Feather River Contractors (FRC) will not be reduced based on any reduction in contractual supplies to the SRSCs or the FRCs resulting from an operations plan for the Central Valley Project (CVP) or State Water Project (SWP) that is necessary to address dry hydrologic conditions and is designed to conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies. It would be unreasonable for junior water right holders or claimants to divert any water projected to be unused under water rights or claims held by the SRSCs or FRCs under those circumstances because the water would not be available for diversion and use by junior water right holders or claimants but for the reduced contractual supplies, and the water would need to remain instream to conserve cold water pools, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies in accordance with the operations plan.

(e) A water right holder or claimant may submit information to the Deputy Director to: support a proposed correction to the water right priority date of the right for which the order was issued; or propose that curtailment may not be appropriate for a particular diverter or in a specific stream system as demonstrated by verifiable circumstances, such as a system that has been adjudicated and is disconnected and curtailment would not make water available to serve senior downstream water rights or claims. The Deputy Director will review timely-provided proposals and supporting information and analyses as soon as practicable, make a determination regarding the proposal, and inform the affected water right holder or claimant of any appropriate update for purposes of water diversion curtailment orders. Before making any determinations within the Legal Delta, the Deputy Director will consult with the Delta Watermaster.

(f) Water right holders and claimants in the Delta Watershed must either subscribe to the Delta Drought email distribution list referenced in subdivision (c) or frequently check the State Water Board's drought webpage to receive updated information regarding water diversion curtailment and reporting orders and water unavailability.

(g) The Deputy Director will temporarily suspend curtailments for some diverters, in order of water right priority, when water availability increases or is projected to increase due to precipitation and runoff events or due to reductions in demand, and the Deputy Director determines that such increased water availability warrants a suspension. The Deputy Director will consider the best available information, such as water supply forecasts from the California Department of Water Resources and other similarly reliable sources, to determine the geographic scope and duration of suspension. By no later than October 1, 2021, and by no more than every 30 days thereafter, the Deputy Director will consider reliable and publicly available information that supports suspension, extension of suspension, or reimposition of curtailments of water diversions, and will publicly issue an update explaining any decisions resulting from the consideration of that information.

(h) All curtailment orders issued under this section shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

## **877 [Reserved]**

### **877.1 Definitions**

(a) “Curtailment Order” refers to an order from the Deputy Director of the Division of Water Rights ordering a water right holder to reduce or cease diversions. A curtailment order may require the recipient to monitor and comply with a curtailment status list if curtailments are not required immediately upon issuance of the order.

(b) “Curtailment Status List” refers to a list published by the Deputy Director with the current status of curtailments noticed under a curtailment order.

(c) “Delta Watermaster” has the same meaning as in Water Code section 85230.

(d) “Delta Watershed” or “Sacramento-San Joaquin Delta Watershed” refers to the Hydrologic Unit Code level 4 Sacramento and the Hydrologic Unit Code level 4 San Joaquin subregions, as defined using the U.S. Geological Survey Hydrologic Units Dataset.

(e) “Deputy Director” refers to the Deputy Director of the Division of Water Rights, or duly authorized designee, at the State Water Resources Control Board.

(f) “Informational Order” refers to an order issued by the Deputy Director which orders reporting of water diversion and use information in the Delta Watershed to inform water unavailability determinations and to support the curtailment process described in section 876.1.

(g) “Legal Delta” has the same meaning as the Sacramento-San Joaquin Delta, as defined in Water Code section 12220.

(h) “Minimum human health and safety needs” refers to the amount of water necessary to prevent adverse impacts to human health and safety, for which there is no feasible alternate supply. “Minimum human health and safety needs” include:

(1) Domestic water uses including water for human consumption, cooking, or sanitation purposes. Further, domestic water uses include incidental uses necessary for household animals or domestic sustenance such as small vegetable gardens. As necessary to provide for domestic water use, water diverted for minimum human health and safety needs may include water hauling and bulk water deliveries, so long as the diverter maintains records of such deliveries and complies with the reporting requirements of section 879 of this article, and so long as such diversion and use is consistent with a valid water right.

(2) For Urban Water Suppliers, water uses consistent with demand reduction actions required by the strictest stage of that supplier’s adopted Water Shortage Contingency Plan, which actions must achieve at least a 50% reduction in water use, as part of its Urban Water Management Plan, as described by Water Code Section 10632.

(3) Water supplies necessary for energy sources that are critical to basic grid reliability, as identified by the California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority.

(4) Water supplies necessary to prevent tree die-off that would contribute to fire risk to residences, and for maintenance of ponds or other water sources for fire fighting, in addition to water supplies identified by the California Department of Forestry and Fire Protection or another appropriate authority as regionally necessary for fire preparedness.

(5) Water supplies identified by the California Air Resources Board, a local air quality management district, or other appropriate public agency with air quality expertise, as necessary to address critical air quality impacts to protect public health.

(6) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise.

(7) Other water uses necessary for human health and safety which a state, local, tribal or federal health, environmental, or safety agency has determined are critical to public health and safety or to the basic infrastructure of the state. Diverters wishing to continue diversions for these uses must identify the health and safety need, include approval or similar relevant documentation from the appropriate public agency, describe why the amount requested is critical for the need and cannot be met through alternate supplies, state how long the diversion is expected to continue, certify that the supply will be used only for the stated need, and describe steps taken and planned to obtain alternative supplies.

(i) "Russian River Watershed" refers to the area located in Mendocino and Sonoma Counties that drains towards the outlet of the Russian River at the Pacific Ocean.

(j) "State Water Board" refers to the State Water Resources Control Board.

(k) "Urban Water Supplier" has the same meaning as defined in Water Code section 10617.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183.

### **878 Non-Consumptive Uses**

Non-consumptive uses under any valid basis of right may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions set forth in this section. For the purposes of this section, a non-consumptive use is one for which direct diversion and use of water does not decrease downstream flows or the availability of water for downstream water users. Any diverter wishing to continue diversion under this section must submit to the Deputy Director a certification, under penalty of perjury, which describes the non-consumptive use of water and explains, with supporting evidence, how the diversion and use do not decrease downstream flows in the applicable watershed. The Deputy Director may request additional information and may invalidate any non-consumptive use certification if the information provided is insufficient to support eligibility or if more convincing evidence contradicts the claims in the certification. If a certification submitted pursuant to this section is invalidated, the diversions are subject to any curtailment order issued for that basis of right.

This section applies to:

- (a) Direct diversions solely for hydropower if discharges are returned to the source stream or its tributaries and water is not held in storage.
- (b) Direct diversions dedicated to instream uses for the benefit of fish and wildlife pursuant to Water Code section 1707, including those that divert water to a different location for subsequent release, provided the location of release is hydraulically connected to the source stream.
- (c) Direct diversions subject to curtailment orders issued under sections 877.2 and 877.3 where the Deputy Director, the California Department of Fish and Wildlife, and the Executive Officer of the North Coast Regional Board have approved a substitution of releases of either stored water or groundwater into the Russian River or a tributary thereof such that there is no net decrease in stream flow as a result of the diversion. The rate of releases made pursuant to this subdivision must be measured daily using a device or measurement method approved by the Deputy Director and provided to the Deputy Director on a monthly basis. Proposals involving the release of groundwater shall provide sufficient data and information to reasonably quantify any depletions of surface water caused by the groundwater pumping, the potential time lags of those depletions, and if additional groundwater releases beyond the diversion amounts are able to offset those depletions. The release of water does not have to be conducted by the owner of the water right proposed for the continued diversions, provided an agreement between the water right holder and the entity releasing the water is included in the proposal.
- (d) Other direct diversions solely for non-consumptive uses if those diverters file with the Deputy Director a certification under penalty of perjury demonstrating that the diversion and use are non-consumptive and do not decrease downstream flows in the watershed or the availability of water for downstream water users.
- (e) Direct diversions located within the Legal Delta used exclusively to irrigate lands entirely below sea level when comparison of diversion and drainage records provide substantial evidence that continued irrigation of those lands does not increase net channel depletions.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 187, 275, 348, Water Code

### **878.1 Minimum Human Health and Safety Needs**

- (a) Diversions described in this section under any valid basis of right may be authorized to continue notwithstanding curtailment of that right, subject to the

conditions set forth in this section. A diversion that would otherwise be subject to curtailment may be authorized if:

(1) The diversion is necessary for minimum human health and safety needs; and therefore,

(2) The diversion is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversions on more senior water rights or instream beneficial uses.

(b)

(1) Diversions for minimum human health and safety needs under any valid basis of right of not greater than 55 gallons per person per day may continue notwithstanding curtailment of that right without further approval from the Deputy Director, subject to the conditions set forth in this section. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director certification, under penalty of perjury, of compliance with the requirements of subdivisions (b)(1)(A)-(E), below. The Deputy Director may request additional information or set additional requirements on continued diversion.

(A) Not more than 55 gallons per person per day will be diverted under all bases of right.

(B) The diversion is necessary to serve minimum human health and safety needs as defined in section 877.1, subdivision (h), after all other alternate sources of water have been used. To the extent other water sources are available, those sources will be used first and the total used will not exceed 55 gallons per person per day.

(C) The diverter and all end users of the diverted water have implemented all available conservation measures and are operating under the strictest existing conservation plan for that place of use, if such a plan exists for the area or service provider. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken immediately to ensure prompt approval.

(D) If the diverter or anyone using water under the diverter's basis of right is an Urban Water Supplier, it has declared a water shortage emergency condition and either already has adopted regulations and restrictions on the delivery of water or will adopt conservation and water delivery restrictions and regulations within a timeframe specified by the Deputy Director as a condition of certification.

(E) The diverter has either pursued steps to acquire other sources of water, but has not yet been completely successful, as described in an attached report, or the diverter will pursue the steps in an attached plan to identify and secure additional water.

(2) To the extent that a diversion for minimum human health and safety needs requires more than 55 gallons per person per day, or cannot be quantified on the basis of gallons per person per day, continued diversion of water notwithstanding curtailment of the applicable water right requires submission of a petition demonstrating compliance with the requirements of subdivisions (b)(1)(B)-(E) above and (b)(2)(A)-(F) below, and approval by the Deputy Director. The Deputy Director may condition approval of the petition on implementation of additional conservation measures and reporting requirements. Any petition to continue diversion to meet minimum human health and safety needs of more than 55 gallons per person per day must:

(A) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum human health and safety needs.

(B) Estimate the amount of water needed.

(C) Certify that the supply will be used only for the stated need.

(D) Describe any other additional steps the diverter will take to reduce diversions and consumption.

(E) Provide the timeframe in which the diverter expects to reduce usage to no more than 55 gallons per person per day, or why minimum human health and safety needs will continue to require more water.

(F) As necessary, provide documentation that the use meets the definition of minimum human health and safety needs provided in section 877.1, subdivision (h). For water supplies necessary for fire prevention or firefighting purposes, substantiating documentation, such as guidance from the local fire department, local city or county ordinances, or equivalent local requirements, may be requested by the Deputy Director.

(c) For public water systems with 15 or greater connections and small water systems of 5 to 15 connections, gallons per person per day shall be calculated on a monthly basis and the calculation methodology shall be consistent with the State Water Board's Percentage Residential Use and Residential Gallons Per Capita Daily Calculation (PRV and R-GPCD Calculation), dated September 22, 2020, which is hereby incorporated by reference.

(d) For water supplies necessary for electrical power generation critical to grid reliability, substantiating documentation, such as a letter of support from California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority, must be provided.

(e) To the extent necessary to resolve immediate public health or safety threats, a diversion subject to curtailment may continue while a petition under subdivision (b)(2) is being prepared and is pending. The Deputy Director may require additional information to support the initial petition, information on how long the diversion is expected to continue, and a description of other steps taken or planned to obtain alternative supplies.

(f) Notice of certifications, petitions, and decisions under this section and section 878 will be posted as soon as practicable on the State Water Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing notice.

(g) Notwithstanding California Code of Regulations, Title 23, section 1064, a petition pursuant to Water Code section 1435 or 1725 solely for the provision of water for minimum human health and safety, as defined by section 877.1, subdivision (h), shall be accompanied by a filing fee of \$250.

(h) Diversion and use within the Russian River Watershed or Delta Watershed, including Mill Creek and Deer Creek, that deprives water for minimum human health and safety needs in 2022, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2023, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by implementing the curtailment methodology described in sections 877.2, 877.3, 877.4, and 877.5 for diversions in the Russian River Watershed, section 876.1 for diversions in the Delta Watershed, and section 876.5 for diversions in the Mill Creek and Deer Creek Watersheds.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

## **878.2 Alternative Water Sharing Agreements**

Water users may propose alternatives to water diversion curtailment that achieve the intent of the curtailment process described under section 876.1 by submitting a proposal to the Deputy Director. Joint proposals must be explicitly agreed to by all participants and describe the setting, the parties, the actions, the provisions for monitoring, record keeping and reporting, and the purported benefits of the proposal in sufficient detail to

demonstrate to the satisfaction of the Deputy Director that implementing the proposal will not injure non-party legal users of water or result in an unreasonable impact on fish and wildlife. In considering a proposal under this section, the Deputy Director may request additional information or consult with other entities that may have technical or legal information that should be considered in evaluating such proposals, including but not limited to the California Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation). The Deputy Director will consult with the Delta Watermaster on any proposals among diverters within the Legal Delta. A proposal may be implemented pending review by the Deputy Director provided that potentially affected water right holders and claimants, including but not limited to DWR and Reclamation, concur with the proposal and no objections to the proposal are submitted to the Deputy Director. The Deputy Director may approve a proposal subject to conditions, including record keeping and reporting requirements, and provided that the Deputy Director finds implementing the proposal will not injure non-party legal users of water or result in an unreasonable impact on fish and wildlife. Diversions consistent with a proposal implemented or approved pursuant to this section are subject to this article, and violations of the terms of the proposal shall be subject to enforcement as a violation of this article or as an unauthorized diversion or use of water.

Notice of proposals and decisions under this section will be posted as soon as practicable on the State Water Board's Delta drought webpage. The Deputy Director may issue a decision under this section prior to providing such notice. Any interested person may file a comment or objection to the proposal or decision with the Deputy Director with simultaneous service to the parties who submitted the proposal. The Deputy Director will consider any comment or objection. The State Water Board may hold a hearing on any proposal to which parties have objected, after notice to all interested persons.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 109, 275, 1011, 1011.5, 1051.5, Water Code; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

## **879 Reporting**

(a) All water users or water right holders whose continued diversion may be authorized under section 878.1 are required to submit, under penalty of perjury, information identified on a schedule established by the Deputy Director as a condition of certification or petition approval pursuant to section 878.1. The required information may include, but is not limited to, the following:

- (1) The water right identification numbers under which diversions continue;
- (2) The public water system identification number for any public water system served by the diversions.

(3) How the diverter complies with any conditions of continued diversion, including the conditions of certification under section 878.1, subdivision (b)(1);

(4) Any failures to comply with conditions, including the conditions of certification under section 878.1, subdivision (b)(1), and steps taken to prevent further violations;

(5) Conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation;

(6) Efforts to obtain alternate water sources;

(7) If the diversion is authorized under an approved petition filed pursuant to section 878.1, subdivision (b)(2), progress toward implementing the measures imposed as conditions of petition approval;

(8) If the diversion is authorized under section 878.1, subdivision (b)(2):

(A) The rate of diversion if it is still ongoing;

(B) Whether the water has been used for any other purpose; and

(C) The date diversion ceased, if applicable.

(9) The total water diversion for the reporting period and the total population served for minimum human health and safety needs. The total population must include actual or best available estimates of external populations not otherwise reported as being served by the water right holder, such as individuals receiving bulk or hauled water deliveries for indoor water use.

(10) Diversion amounts for each day in acre-feet per day, maximum diversion rate in cubic feet per second, and anticipated future daily diversion amounts and diversion rates.

(b) The Deputy Director, or delegee, may issue an order under this article requiring any person to provide additional information reasonably necessary to assess their compliance with this article. Any person receiving an order under this subdivision shall provide the requested information within the time specified by the Deputy Director, but not less than ten (10) days after issuance.

(c) This subdivision applies to Delta Watershed curtailment orders and enhanced reporting to inform water unavailability determinations and the curtailment process described under section 876.1.

(1) All water right holders and claimants issued an initial order pursuant to section 876.1 are required, within the deadlines specified in the initial order but no sooner than seven calendar days following issuance of the order, to submit under penalty of perjury a certification that they have and will continue to take actions needed to comply with section 876.1, including the following actions:

(A) Regularly reviewing information posted on the State Water Board's drought webpage to determine when curtailments are required and when curtailments are suspended or reimposed, or subscribing to the State Water Board's Delta Drought email distribution list to receive updates directly; and

(B) Ceasing diversions of natural and abandoned flow when curtailments are ordered, except to the extent that continuing diversions are authorized in accordance with section 878, 878.1, 878.2, or 879.1 subdivision (b), and ceasing rediversions of water released from storage, except to the extent authorized by a water right or contract.

(2) In addition to the requirements identified under subdivision (c)(1), the Deputy Director may require water right holders and claimants who have been issued an initial order under section 876.1 and whose water right or claim has a total authorized face value or recent annual reported diversion amount of one thousand acre-feet or greater to report the following information by the date specified by the Deputy Director, but no earlier than seven days after receipt of the reporting order and as specified thereafter:

(A) Prior diversions, unless otherwise reported in annual reports of water diversion and use, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.

(B) Demand projections for subsequent months through October 1, 2023, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.

(C) Before issuing orders issued pursuant to subdivision (c)(2) to water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.

(3) In order to inform curtailment decisions, the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may issue informational orders under subdivision (c) of this section requiring a water right holder,

diverter, or user to provide additional information related to a diversion or use of water in the Delta Watershed, including but not limited to: additional reporting of water diversions and use; the basis of right with supporting documents or other evidence; property patent date for the place of use; the date of initial appropriation; anticipated or actual water transfer amounts; or any other information relevant to forecasting demands and supplies and determining compliance with curtailment orders in the current drought year or in contingency planning for continuation of the current drought emergency. Informational orders may require reporting of diversions made in prior months and diversions anticipated during subsequent months on a recurring, monthly basis.

(4) Any water right holder or claimant receiving an order under subdivision (c) of this section shall provide the requested information within the deadlines specified therein, including any recurring deadlines associated with ongoing reporting requirements as applicable. The Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may grant additional time for submission of information upon substantial compliance with the specified deadline and a showing of good cause. Information provided pursuant to subdivision (c) of this section shall be submitted in an online form maintained by the State Water Board and accessible through its website, or in an electronic format as specified by the Deputy Director or Delta Watermaster.

(5) Failure to provide the information required under subdivision (c) of this section within the deadlines specified in the order or any time extension granted by the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.

(6) In determining whether to impose reporting requirements under subdivision (c) of this section, the Deputy Director and Delta Watermaster will consider the need for the information for purposes of informing curtailment decisions and the burden of producing it, and will make reasonable efforts to avoid requiring duplicative reporting of information that is already in the State Water Board's possession.

(7) All orders issued under subdivisions (c)(2) and (c)(3) shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 100, 187, 275, 348, 1051, 1058.5, 1841 Water Code.

### **879.1 Conditions of Permits, Licenses and Registrations**

(a) Compliance with this article, including any conditions of certification or approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations for diversions from any watershed identified in this article.

(b) Diversions may continue after the issuance of a curtailment order to the extent the maintenance of a mechanism allowing for the bypass of natural or abandoned flow is not conditioned in a water right permit, license, stockpond certificate, or registration not exceeding a total authorized face value of ten acre-feet per year.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1253, 1058.5, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

### **879.2 Compliance and Enforcement**

(a) A water user must comply with a curtailment order issued under this article, any updates to the curtailment status list, all conditions of certification or approval of a petition under this article, and all water right conditions under this article, notwithstanding receipt of more than one curtailment order. To the extent of any conflict between applicable requirements, the diverter must comply with the requirements that are the most stringent.

(b) When conducting an inspection to assess a diverter's compliance with this article, the State Water Board may obtain an inspection warrant pursuant to the procedures set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure where access is not granted by the property owner.

(c) Failure to meet the requirements of this article or of any order issued thereunder constitutes a violation subject to civil liability pursuant to Water Code section 1846, and an infraction pursuant to Water Code section 1058.5, subdivision (d), each of which can carry a fine of up to five hundred dollars (\$500) for each day in which the violation occurs.

(d) Nothing in this section shall be construed as limiting the enforceability of or penalties available under any other provision of law.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1052, 1055, 1058.5, 1825, 1831, 1846, Water Code; Sections 1822.50 et al., California Code of Civil Procedure; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

**879.3 Redelegation of Authorities**

Authorities delegated to the Deputy Director under this article may be redelegated.

Authority: Sections 1058, 1058.5, Water Code

Reference: State Water Resources Control Board Resolution No. 2012-0029